TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 381.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA, TO THE USE OF LEWIS E. SMOOT.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JULY 18, 1902.

(18,607.)

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In the Court of Appeals of the District of Columbia.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Appellant,
vs.
THE UNITED STATES OF AMERICA, to the Use of LEWIS E. SMOOT. } No. 1205.

a Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, to the Use of Lewis E. Smoot, Plaintiff,
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Defendant. } No. 45237. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed February 15, 1902.

In the Supreme Court of the District of Columbia.

U. S. OF AMERICA, Plaintiff, to the Use of Lewis E. Smoot,
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Defendant. } At Law. No. 45237.

Said plaintiff sues the defendant, The Fidelity and Deposit Company of Maryland, a body corporate under the laws of Maryland and having an office and doing business in the District of Columbia, for money payable by said defendant to the plaintiff for that on the 26th day of September, 1900, Peyton D. Vinson, as principal, and said defendant, as surety, by their writing obligatory, sealed with their seals, and a certified copy of which — now produced in court, the date whereof is the day and year aforesaid, acknowledged themselves to be jointly and severally held and firmly bound unto said plaintiff, The United States of America, in the penal sum of twenty-

five thousand dollars, to be paid to the plaintiff, with certain conditions thereunder written, that if the said Peyton D. Vinson, his heirs, executors, and administrators, shall and will in all respects duly observe and perform all and singular the covenants, conditions, and agreements in and by a certain written contract dated the 26th day of September, 1900, between said Peyton D. Vinson and the District of Columbia, represented by Henry B. F. Macfarland, John W. Ross, and Lansing H. Beach, Commissioners of the District of Columbia,
for the completion of certain public work agreed and cove-
2 nanted by the said Peyton D. Vinson to be observed and performed, and will promptly make payments to all persons supplying him with labor and materials in the prosecution of the work provided for in said contract between said Peyton D. Vinson and the said District of Columbia, represented by the Commissioners aforesaid, then the above-bounden obligation shall be void and of no effect; otherwise to remain in full force and virtue.

And thereafter, to wit, on the 19th day of March, 1901, the said Lewis E. Smoot, at the request of the said Peyton D. Vinson, agreed to furnish and deliver to said Peyton D. Vinson and began to deliver to him, in the city of Washington, District of Columbia, sand and pebbles to be used in his said contract with the District of Columbia and of the kind and quality specified in said contract, the prices to be paid therefor to the said Lewis E. Smoot being agreed upon as follows: Brick-work sand, 60 cents per cubic yard; concrete sand, 50 cents per cubic yard; pebbles, 80 cents per cubic yard; and said Peyton D. Vinson agreed to pay to said Lewis E. Smoot, on demand, the value of the sand and pebbles delivered and accepted at the prices before mentioned.

And thereafter and prior to the 12th day of September, 1901, the said Lewis E. Smoot did furnish to the said Peyton D. Vinson certain quantities of sand and pebbles, to wit, $91\frac{3}{4}$ cubic yards of brick-work sand, $385\frac{1}{8}$ cubic yards of concrete sand, and $438\frac{1}{4}$ cubic yards of pebbles of the kind and quality specified in said contract to be used by the said Peyton D. Vinson in completion of his work under his said contract with the District of Columbia, and said sand
and pebbles were prior to the 12th day of September, 1901,
3 duly accepted as provided in said contract, and were used by said Peyton D. Vinson in carrying out the terms of said contract with said District of Columbia; and said Peyton D. Vinson did not pay to said Lewis E. Smoot the value of the sand and pebbles so delivered and accepted and used, and has not yet paid for the same, but neglects and refuses so to do, notwithstanding the said Lewis E. Smoot has demanded payment therefor.

And the plaintiff says that the sand and pebbles so delivered and accepted and used were of the value of five hundred and ninety-nine dollars and seventy-three cents, and no part thereof has been paid save the sum of $206.95, and thereof the sum of three hundred and ninety-two dollars and seventy-eight cents ($392.78) remains and is wholly unpaid and not secured to be paid; and by reason of said refusal and failure of said Peyton D. Vinson to pay said Lewis

E. Smoot for the sand and pebbles so furnished by him and accepted and used by said Vinson in carrying out the terms of his said contract with the District of Columbia the condition of said writing obligatory was broken, and an action hath accrued unto the plaintiff to have and demand from the said Peyton D. Vinson and the defendant, The Fidelity and Deposit Company of Maryland, the sum of $392.78.

Yet the said defendant, The Fidelity and Deposit Company of Maryland, although requested so to do, has not paid said sum of $392.78 or said penalty of said writing obligatory, but has refused so to do, and still does refuse to pay the same or any part thereof to the plaintiff. Wherefore the plaintiff claims the sum of $392.78, with interest thereon from the 12th day of September, 1901, besides costs.

And said plaintiff further sues the said defendant, The Fidelity and Deposit Company of Maryland, for money payable
4 by said defendant to the plaintiff for that on the 28th day of June, 1901, Peyton D. Vinson, as principal, and said defendant, as surety, by their writing obligatory, sealed with their seal, and a certified copy of which is now produced in court, the date whereof is the day and year aforesaid, acknowledged themselves to be jointly and severally held and firmly bound unto the said plaintiff, The United States of America, in the penal sum of six thousand seven hundred and fifty dollars, to be paid to the plaintiff, with certain conditions thereunder written, that if the said Peyton D. Vinson, his heirs, executors, and administrators, shall and will in all respects duly observe and perform all and singular the covenants, conditions, and agreements in and by a certain written contract dated the 28th day of June, 1901, between said Peyton D. Vinson and the District of Columbia, represented by Henry B. F. MacFarland, John W. Ross, and Lansing H. Beach, Commissioners of the District of Columbia, for the completion of certain public work agreed and covenanted by the said Peyton D. Vinson to be observed and performed, and will promptly make payment to all persons supplying him with labor and materials in the prosecution of the work provided for in said contract between the said Peyton D. Vinson and the said District of Columbia, represented by the Commissioners aforesaid, then the above-bounden obligation shall be void and of no effect; otherwise to remain in full force and virtue.

And thereafter, to wit, on the 11th day of September, 1901, the said Lewis E. Smoot, at the request of the said Peyton D. Vinson, agreed to furnish and deliver to said Peyton D. Vinson and began
5 to deliver to him in the city of Washington, District of Columbia, sand and pebbles to be used in said contract with the District of Columbia, and of the kind and quality specified in said contract, the prices to be paid therefor to the said Lewis E. Smoot being agreed upon as follows: Brick-work sand, 60 cents per cubic yard; concrete sand, 50 cents per cubic yard; pebbles, 80 cents per cubic yard; and said Peyton D. Vinson agreed to pay to said Lewis E. Smoot on demand the value of the sand and pebbles delivered and accepted at the prices before mentioned.

And thereafter and prior to the 3rd day of November, 1901, the said Lewis E. Smoot did furnish to the said Peyton D. Vinson certain quantities of sand and pebbles, to wit, $35\frac{5}{8}$ cubic yards of brick-work sand, 81 cubic yards of concrete sand, and $100\frac{5}{8}$ cubic yards of pebbles of the kind and quality specified in said contract to be used by the said Peyton D. Vinson for the completion of his work under his said contract with the District of Columbia, and said sand and pebbles were prior to the 3rd day of November, 1901, duly accepted as provided for in said contract and were used by said Peyton D. Vinson in carrying out the terms of said contract with the said District of Columbia, and said Peyton D. Vinson did not pay to said Lewis E. Smoot the value of the sand and pebbles so delivered and accepted and used and has not yet paid for the same, but neglects and refuses so to do, notwithstanding the said Lewis E. Smoot has demanded payment therefor; and the plaintiff says that the sand and pebbles so delivered and accepted and used were of the value of one hundred and forty-three dollars and twenty-eight cents, and no part thereof has been paid, and the same is wholly unpaid and not secured to be paid; and by reason of said refusal and failure of said

6 Peyton D. Vinson to pay said Lewis E. Smoot for the sand and pebbles so furnished by him and accepted and used by said Vinson in carrying out the terms of his said contract with the District of Columbia the condition of said writing obligatory was broken and an action hath accrued unto the plaintiff to have and demand from the said Peyton D. Vinson and the defendant, The Fidelity and Deposit Company of Maryland, the sum of $143.28.

Yet the said defendant, The Fidelity and Deposit Company of Maryland, although requested so to do, has not paid the said sum of $143.28 or said penalty of said writing obligatory, but has refused so to do and still does refuse to pay the same or any part thereof to the plaintiff. Wherefore the plaintiff claims the sum of $143.28, with interest thereon from the 3rd day of November, 1901, besides costs.

CRANDAL MACKEY,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the date of service hereof; otherwise judgment.

CRANDAL MACKEY,
Attorney for Plaintiff.

7 *Affidavit by Use Plaintiff.*

DISTRICT OF COLUMBIA, *ss:*

I, Lewis E. Smoot, of Washington, D. C., being duly sworn, depose and say: That I am the person named in the foregoing declaration, and furnished under the agreements therein set forth sand and pebbles in said declaration mentioned, and am the person to whose use

the action in which this affidavit is to be used is brought as set forth in the foregoing declaration; that on the days and dates and between the times stated in said declaration this affiant did agree to furnish and deliver and did furnish and deliver to said Peyton D. Vinson certain sand and pebbles at and for the certain prices in said declaration mentioned and of the quantities therein set forth, and said Peyton D. Vinson agreed to pay said prices on demand, as described in said declaration; that this affiant, from the 19th day of March, 1901, to the 12th day of September, 1901, did furnish and deliver to said Peyton D. Vinson, under his said contract with the District of Columbia dated September 26, 1900, and known as contract numbered 2870, the following quantity of sand and pebbles, to wit, 91⅞ cubic yards of brick-work sand, 385½ cubic yards of concrete sand, and 138⅛ cubic yards of pebbles of the kind and quality specified in said contract to be used by said Peyton D. Vinson in the completion of his work under said contract between him and the District of Columbia; and this affiant, from the 11th day of September, 1901, to the 2nd day of November, 1901, did furnish and deliver to said Peyton D. Vinson, under his said contract with the District of Columbia dated the 28th day of June, 1901, known as contract numbered 2942, the following quantity of sand and pebbles, to wit, 35⅞ cu-
8 bic yards of brick-work sand, 81 cubic yards of concrete sand, and 100⅝ cubic yds. of pebbles of the kind and quality specified in said contract to be used by said Peyton D. Vinson in the completion of his work under said contract between him and the District of Columbia; and all of said sand and pebbles were duly accepted as provided for in said contracts and were used by said Peyton D. Vinson in the completion of his said public work under his said contracts with the District of Columbia, and said Peyton D. Vinson did not pay and has not yet paid for said sand and pebbles so delivered and accepted and used in the completion of his said work under said contracts, but neglects and refuses so to do, although affiant has demanded payment for the same.

And deponent says that the value of the sand and pebbles so delivered, accepted, and used was, at the prices agreed upon, $743.01, no part of which has been paid save the sum of $206.95, and thereof the sum of $536.06 remains and is wholly unpaid; that the bonds or obligations between Peyton D. Vinson, as principal, and the Fidelity and Deposit Company of Maryland, the defendant, as surety, and the District of Columbia, in said declaration mentioned, are the genuine bonds of said Peyton D. Vinson and said Fidelity and Deposit Company of Maryland, signed and sealed by them, profert of which has been made in the foregoing declaration, and every part of the said declaration and each and every allegation therein contained is hereby reiterated and made a part of this affidavit, and that the full sum of $392.78, with interest from the 12th day of September, 1901, and the full sum of $143.28, with interest from the 3rd day of November, 1901, as claimed in said declaration, are justly due and owing from said Fidelity and Deposit Company of

Maryland to the plaintiff in said declaration named for the
9 use of the deponent, exclusive of all set-offs and just grounds of defence.

LEWIS E. SMOOT.

Subscribed and sworn to before me this 14th day of February, 1902.

GUY H. JOHNSON,
Notary Public, D. C.

[SEAL.]

Motion to Strike Affidavit from Files.

Filed March 4, 1902.

In the Supreme Court of the District of Columbia.

UNITED STATES, Use of SMOOT,
vs.
THE FIDELITY AND DEPOSIT CO. OF MARYLAND. } No. 45237.

The defendant, by its attorney, moves the court to strike from the files the affidavit in support of the declaration, upon the ground that the suit does not fall within the purview of the 73d common-law rule of the court.

L. H. POOLE,
Attorney for Defendant.

To Crandal Mackey, attorney for plaintiff:

Please take notice that the above motion will be called for hearing in circuit court No. 1, Friday, March 7, next, at 10 o'clock, or as soon thereafter as counsel can be heard.

L. H. POOLE,
Attorney for Defendant.

10 Service acknowledged this 27th day of February, 1902.

CRANDAL MACKEY,
Attorney for Plaintiff.

Memorandum.

March 7, 1902.—Motion to strike out plaintiff's affidavit overruled.

Pleas and Affidavit.

Filed March 14, 1902.

In the Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, to the Use of LEWIS E. Smoot, Plaintiff,
vs.
THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Defendant.
No. 45237.

1. The said Fidelity and Deposit Company of Maryland for a plea to the first count of said declaration says that the said Peyton D. Vinson does not owe the said sum of money demanded in said count, or any part thereof, in manner and form as the said United States have above complained; and of this the said Fidelity and Deposit Company of Maryland puts itself upon the country.

11 2. And for a further plea to the said first count, the leave of the court being first had and obtained, the said Fidelity and Deposit Company of Maryland says that it does not owe the said sum of money demanded in said count, or any part thereof, in manner and form as the said United States have complained; and of this the said Fidelity and Deposit Company of Maryland puts itself upon the country.

3. And for a further plea to the said first count, the leave of the court being first had and obtained, the said Fidelity and Deposit Company of Maryland says that it has not broken the conditions of said bond, or any of them, in manner and form as the said United States have above complained; and of this the said Fidelity and Deposit Company of Maryland puts itself upon the country.

4. And the said Fidelity and Deposit Company of Maryland, for a plea to the second count of said declaration, says that the said Peyton D. Vinson does not owe the said sum of money demanded in said count, or any part thereof, in manner and form as the said United States have above complained; and of this the said Fidelity and Deposit Company of Maryland puts itself upon the country.

5. And for a further plea to the said second count, the leave of the court being first had and obtained, the said Fidelity and Deposit Company of Maryland says that it does not owe the said sum of money demanded in said second count, or any part thereof, in manner and form as the said United States have above complained; and of this the said Fidelity and Deposit Company of Maryland puts itself upon the country.

12 6. And for a further plea to the said second count, the leave of the court being first had and obtained, the said Fidelity and Deposit Company of Maryland says it has not broken the conditions of said bond, or any of them, in manner and form as the said United States have above complained; and of this the said

Fidelity and Deposit Company of Maryland puts itself upon the country.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By L. H. POOLE, *Its Attorney.*

In the Supreme Court of the District of Columbia.

Filed March 14, 1902.

UNITED STATES OF AMERICA, Use of LEWIS E. SMOOT, Plaintiff,
vs.
THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Defendant.
No. 45237.

J. Sprigg Poole, being first duly sworn, deposes and says:

1. That he is now, and for ten years last past has been, the general agent for the District of Columbia of The Fidelity and Deposit Company of Maryland, the defendant in the above-entitled cause.

2. That the said defendant admits the execution of the bonds as alleged in the declaration in said cause.

3. That the said defendants, its officers and agents, have
13 no personal knowledge of the contracts alleged in said declaration to have been entered into by and between Lewis E. Smoot and Peyton D. Vinson, or of the indebtedness alleged to be due from said Vinson to said Smoot under said alleged contracts; that the said defendant, its officers and agents, have not sufficient information, in the opinion of the affiant and of the counsel of said defendant, its attorney of record in said cause, to be safe in admitting or denying under oath the allegations of said declaration in regard to said contracts between said Smoot and Vinson, or the indebtedness thereunder, and in so far as said defendant is sought to be charged with the payment of said alleged indebtedness from Vinson to Smoot it calls for strict proof of said alleged indebtedness.

4. That said defendant is advised by its counsel that it is entitled under the law of the land to trial by jury as to the truth of the allegations of the declaration in regard to said alleged contracts between the said Smoot and Vinson and the alleged indebtedness under said contracts; that said defendant does not waive, but expressly claims, the benefit of the right of trial by jury, and prays that this honorable court will not enter judgment against it, the said defendant, without trial by jury upon the issues tendered by the pleas filed to said declaration.

That this prayer for trial by jury is not made for the purpose of delay, but solely because the defendant is advised by counsel and believes that, under the law of the land, it is entitled to trial by jury in this cause, and that it cannot waive or surrender that
14 right without exposing itself to the danger of being deprived of its property without due process of law.

J. SPRIGG POOLE.

Subscribed and sworn to before me this 13 day of March, A. D. 1902.

[SEAL.] W. H. RONSAVILLE,
Notary Public.

Motion for Judgment under 73d Rule.

Filed March 18, 1902.

In the Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, to the Use of Lewis E. Smoot, Plaintiff,
vs.
THE FIDELITY AND DEPOSIT COMPANY OF Maryland, Defendant.
At Law. No. 45237.

Now comes the plaintiff and moves the court for judgment in the above-cited cause under the 73rd rule, for failure of the defendant to file with his plea a sufficient affidavit of defense.

CRANDAL MACKEY,
Attorney for Plaintiff.

To L. H. Poole, Esq., attorney for the defendant:

15 Take notice that on Friday, March 21, 1902, at ten o'clock a. m., or as soon thereafter as counsel can be heard, I will call up the above motion before Chief Justice Bingham, holding a circuit court.

CRANDAL MACKEY,
Attorney for Plaintiff.

Supreme Court of the District of Columbia.

FRIDAY, *March* 21, 1902.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

UNITED STATES OF AMERICA, to the Use of Lewis E. Smoot, Plaintiff,
vs.
FIDELITY AND DEPOSIT COMPANY OF Maryland, Defendant.
At Law. No. 45237.

Upon hearing the plaintiff's motion for judgment for want of sufficient affidavit of defense, it is considered that said motion be, and hereby is, granted. Therefore it is considered that the plaintiff recover against the defendant five hundred and thirty-six dollars and six cents ($536.06), with interest on $392.78 from the 12th day of September, 1901, and on $143.28 from the 3rd day of November, 1901, being the money payable by said defendant to the plaintiff by reason of the premises, together with his costs of suit, to be taxed by the clerk, and have execution thereof.

16 *Order for Appeal.*

Filed March 27, 1902.

In the Supreme Court of the District of Columbia, the 27th Day of March, 1902.

U. S., Use of SMOOT,
vs.
THE FIDELITY & DEPOSIT CO. OF MARYLAND. } At Law. No. 45237.

The clerk of said court will please enter an appeal from the judgment in this case, and issue citation to the plaintiff.

L. H. POOLE,
Attorney for Defendant.

17 Filed Mar. 31, 1902. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, to the Use of Lewis E. Smoot,
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND. } At Law. No. 45237.

The President of the United States to the United States of America, to the use of Lewis E. Smoot, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the clerk's office of the supreme court of the District of Columbia on the 27th day of March, 1902, wherein The Fidelity and Deposit Company of Maryland is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 27th day of March, in the year of our Lord one thousand nine hundred and two.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 29th day of March, 1902.

CRANDAL MACKEY,
Attorney for Appellee.

18 *Memorandum.*

March 27, 1902.—Appeal bond, to act as supersedeas, filed.

Order for Transcript.

Filed April 7, 1902.

In the Supreme Court of the District of Columbia.

UNITED STATES, Use of SMOOT,
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND. } At Law. No. 45237.

It is hereby stipulated by the parties to the above-entitled cause that the bill of particulars may be omitted from the record on appeal, the record in all other respects to be a full and complete record, omitting only such formal parts as may, by the rules of the Court of Appeals, be omitted.

L. H. POOLE,
Attorney for Appellant.
CRANDAL MACKEY,
Attorney for Appellee.

19 UNITED STATES OF AMERICA, } *ss.:*
District of Columbia, }

Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 19, inclusive, to be a true and correct transcript of the record, as per stipulation of counsel herein filed, copy of which is made part of this transcript, in cause No. 45237, at law, wherein The United States of America, to the use of Lewis E. Smoot, is plaintiff and The Fidelity and Deposit Company of Maryland is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 12th day of April, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1205. The Fidelity and Deposit Company of Maryland, appellant, *vs.* The United States of America, to the use of Lewis E. Smoot. Court of Appeals, District of Columbia. Filed Apr. 12, 1902. Robert Willett, clerk.

FRIDAY, *June 6th, A. D.* 1902.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Appellant,
vs.
THE UNITED STATES OF AMERICA, to the Use of LEWIS E. SMOOT. } No. 1205.

The argument in the above-entitled cause was commenced by Mr. L. H. Poole attorney for the appellant, and was continued by Mr. Crandal Mackey attorney for the appellee, and was concluded by Mr. L. H. Poole attorney for the appellant.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Appellant,
vs.
THE UNITED STATES OF AMERICA, to the Use of LEWIS E. SMOOT. } No. 1205.

(Mr. Justice SHEPARD delivered the opinion of the court:)

The appellant is a surety company authorized to become surety on bonds given by contractors for public works in the District of Columbia, and appeals from a summary judgment rendered against it under the 73d rule of the supreme court of the District.

The bond was executed by appellant as surety for one Peyton D. Vinson with whom a contract for certain public work had been entered into by the District Commissioners, and which, in addition to securing the faithful performance of said contract, was intended also to secure the payment by the contractor for all labor and materials furnished him in the prosecution of his said contract. The bond is identical with that required by the act of Congress of August 13, 1894, (28 Stat., 278), relating to contracts with the United States, and was given under the act of February 28, 1899, making the same provision for contracts with the District of Columbia. (30 Stat. 906; R. S. Supp. vol. 2, part 8, p. 948.)

The purpose and practical effect of this act is to create a special lien in favor of persons furnishing labor and materials to such a contractor, and to substitute the bond for the building, which, in private contracts, is the thing charged. Marble Co. *v.* Burgdorf 13 App. D. C. 506, 519; Richards Brick Co. *v.* Rothwell 18 App. D. C. 516, 536, 537.

Appellee, as plaintiff below, procured a copy of the bond under the requirements of the statute, and filed his suit thereon, alleging, the contract by Vinson with the District, the execution of the bond by Vinson as principal, and appellant, as surety, the furnishing of certain materials to said Vinson for the execution of his contract, the agreed price thereof, and the failure of Vinson to pay a balance due thereon of $536.06. These allegations were supported by an affidavit under the requirements of the 73d rule.

The appellant filed six pleas, denying indebtedness and breach of the conditions of the bond.

With these pleas was filed the following affidavit of defence.

"J. Sprigg Poole, being first duly sworn, deposes and says:

1. That he is now, and for ten years last past has been, the general agent for the District of Columbia of The Fidelity and Deposit Company of Maryland, the defendant in the above-entitled cause.

2. That the said defendant admits the execution of the bonds as alleged in the declaration in said cause.

3. That the said defendants, its officers and agents, have no personal knowledge of the contracts alleged in said declaration to have been entered into by and between Lewis E. Smoot and Peyton D. Vinson, or of the indebtedness alleged to be due from said Vinson to said Smoot under said alleged contracts; that the said defendant, its officers and agents, have not sufficient information, in the opinion of the affiant and of the counsel of said defendant, its attorney of record in said cause, to be safe in admitting or denying under oath the allegations of said declaration in regard to said contracts between said Smoot and Vinson, or the indebtedness thereunder, and in so far as said defendant is sought to be charged with the payment of said alleged indebtedness from Vinson to Smoot it calls for strict proof of said alleged indebtedness.

4. That said defendant is advised by its counsel that it is entitled under the law of the land to trial by jury as to the truth of the allegations of the declaration in regard to said alleged contracts between the said Smoot and Vinson and the alleged indebtedness under said contracts; that said defendant does not waive, but expressly claims, the benefit of the right of trial by jury, and prays that this honorable court will not enter judgment against it, the said defendant, without trial by jury upon the issues tendered by the pleas filed to said declaration.

That this prayer for trial by jury is not made for the purpose of delay, but solely because the defendant is advised by counsel and believes that, under the law of the land, it is entitled to trial by jury in this cause, and that it cannot waive or surrender that right without exposing itself to the danger of being deprived of its property without due process of law."

The plaintiff's motion for judgment was correctly sustained. His affidavit fully satisfied the requirements of the rule. The action was not for damages for the breach of his contract with Vinson, and hence not governed by the case cited by appellant. Deane *v.* Echols 2 App. D. C. 522, 528. His action is one "arising *ex contractu*," as provided in the 73d rule and is in accordance with the terms of the statute conferring the right of action upon the public contractor's bond, being for the contract price of certain materials furnished to said contractor for the execution of his contract and for which he had failed and refused to pay. American Bonding and Trust Co. *v.* Lincoln 15 App. D. C. 397.

That action was upon a contractor's bond executed to the United States under the terms of the act of 1894, heretofore referred to, to recover the value of materials furnished. The point upon which appellant relies in argument, and in accordance with which his affidavit has been framed, was not urged in that case and hence was

not expressly decided. The point is, substantially, that the 73d rule was not intended to apply to an action against a surety on a contractor's bond.

We perceive no reasonable ground, whatever, for excepting the surety from the operation of a rule plainly applicable to his principal. That he may have no actual, personal knowledge of the state of the account between his principal and the creditor is of no material importance. Having voluntarily entered into the obligation, he takes it with its burdens, one of which is that he is charged with the knowledge of his principal. Consequently, he must deny the justice of the demand under oath, or become liable, like his principal, to the summary judgment.

There is no merit in the formal objections urged to the declaration and supporting affidavit of the plaintiff. The bond is alleged to have been executed in accordance with the formal provision of the statute which makes it a public record, and *profert* of it was not required to be made. It is nothing more than a simple statutory obligation to pay any and all demands against the contractor of the nature claimed by the plaintiff. It does not appear that there was any formal written contract between the contractor and the plaintiff relating to the materials furnished by the latter, upon the necessary interpretation of which the liability in whole or in part depends. For the purposes of recovery it was sufficient to say, as was done, that plaintiff agreed to furnish certain materials at a certain price, for use, by the contractor, that he did furnish the same in specific amounts, and that the contractor received them and then refused to pay the sum due for them.

The judgment will be affirmed with costs; and it is so ordered.

Affirmed.

MONDAY, *June 23d, A. D.* 1902.

THE FIDELITY AND DEPOSIT COMPANY of Maryland, Appellant,
vs.
THE UNITED STATES OF AMERICA, to the Use of Lewis E. Smoot. } No. 1205. April Term, 1902.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE SHEPARD.

June 23, 1902.

TUESDAY, *June 24th, A. D.* 1902.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Appellant,
vs.
THE UNITED STATES OF AMERICA, to the Use of LEWIS E. Smoot. } No. 1205.

On motion of Mr. L. H. Poole of counsel for the appellant, it is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond to act as supersedeas is fixed at the sum of one thousand dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between The Fidelity and Deposit Company of Maryland, appellant, and The United States of America to the use of Lewis E. Smoot, appellee a manifest error hath happened, to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of June, in the year of our Lord one thousand nine hundred and two.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

(*Bond on Writ of Error.*)

Know all men by these presents, that we, the Fidelity and Deposit Company of Maryland, a corporation, as principal, and J. Sprigg Poole, of the District of Columbia, as surety, are held and firmly bound unto the United States of America, to the use of Lewis E. Smoot, in the full and just sum of one thousand dollars to be paid to the said United States of America, to the use of Lewis E. Smoot, their certain *certain* attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves,

our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of June, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between the said Fidelity and Deposit Company of Maryland, appellant, against the United States of America, to the use of Lewis E. Smoot, appellees, a judgment was rendered against the said Fidelity and Deposit Company of Maryland, and the said Fidelity and Deposit Company of Maryland having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, to the use of said Lewis E. Smoot, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said Fidelity and Deposit Company of Maryland shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, [SEAL.]

By W. H. ROXSAVILLE,
Attorney-in-fact. [SEAL.]

J. SPRIGG POOLE. [SEAL.]

[Seal of Fidelity and Deposit Company of Maryland.]

Sealed and delivered in the presence of—
JAMES T. HANEY.

Approved by—
R. H. ALVEY,
Chief Justice Court of Appeals of the District of Columbia.

O K.
CRANDAL MACKEY,
Att'y for Appellee.

[Endorsed:] No. 1205. The Fidelity and Deposit Company of Maryland appellant *vs.* The United States of America to the use of Lewis E. Smoot. Bond on writ of error to Supreme Court U. S. Court of Appeals District of Columbia Filed Jul- 3, 1902. Robert Willett, clerk.

UNITED STATES OF AMERICA, *ss:*

To the United States of America, to the use of Lewis E. Smoot, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days rom the date hereof, pursuant to a writ of error, filed in the clerk's

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office of the Court of Appeals of the District of Columbia, wherein The Fidelity and Deposit Company of Maryland is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 3d day of July, in the year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Accepted service July 3–1902

CRANDAL MACKEY,
Att'y for Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jul. 3–1902 Robert Willett clerk.

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 21 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The Fidelity and Deposit Company of Maryland, appellant, *vs.* The United States of America to the use of Lewis E. Smoot No. 1205, April term, 1902, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 3d day of July, A. D. 1902.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,607. District of Columbia, Court of Appeals. Term No. 381. The Fidelity and Deposit Company of Maryland, plaintiff in error, *vs.* The United States of America to the use of Lewis E. Smoot. Filed July 18, 1902.